STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Supreme Court No.: 147091
Court of Appeals No.: 314337
St. Joseph Circuit Court No: 12-17690-FH-1
District Court No.: 11-3527-FY-1

Plaintiff-Appellee,

v

MICHAEL RADANDT,

Defendant-Appellant.

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

Respectfully submitted,

January 26, 2015

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PROOF OF SERVICE

Jessica Schimpf, being duly sworn, deposes and says that I mailed the foregoing Application for Leave to Appeal to opposing counsel at PO Box 250, Centerville, MI 49032, and that a notice of the filing of the application was sent to the clerk of the Court of Appeals and the trial court, by depositing the same in the United States Mail, postage prepaid, at Traverse City, Michigan on January 26, 2015.

/s/ Jessica Schimpf
Revision Legal, PLLC

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NOTICE OF HEARING

PLEASE TAKE NOTICE that on Tuesday, the 17th day of February, 2015, the undersigned will move this Honorable Court to grant the Defendant-Appellant's Application for Leave to Appeal.

Respectfully submitted,

January 26, 2015

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Statement of Question Presented

Officers visited Defendant's residence on two occasions, in the summer and winter of 2012. Both times the officers, purportedly conducting a "knock and talk" procedure, knocked, received no answer, and traversed the entire premises of the home, including the back yard. During the summer visit, the officers located signs of what they believed to be drug activity, but decided those signs were insufficient to establish probable cause to support a search warrant. During this time, the officers also obtained permission from neighbors to enter neighboring property to observe Defendants' home. Subsequent to these measures and during the winter entry, the Officers again walked by the front door, knocked on a side door, received no answer, and entered the back yard, where for the first time, they smelled marijuana. Did the officers unlawfully expand a knock and talk procedure, smell marihuana from an unlawful vantage point, and violate Defendant's reasonable expectation of privacy by entering the back yard after receiving no answer from knocking?

Defendant-Appellant's Answer:	Yes.
Plaintiff-Appellee's Answer:	No.
Circuit Court's Answer:	No.
Court of Appeals' Answer:	No.

Does the good-faith exception to the exclusionary rule apply when an illegal predicate search formed the probable cause to support a subsequent search warrant?

Defendant-Appellant's Answer:	Yes.
Plaintiff-Appellee's Answer:	No.
Circuit Court's Answer:	Did not answer.
Court of Appeals' Answer:	Did not answer.

MCR 7.302(B) Grounds

Imagine a cool, late fall afternoon. You are in your backyard and steaks are on the grill, maybe for the last time of the season. The entire family is outside, the children are raking leaves or spreading them further out, it is hard to tell. Your dog is out, but an invisible fence keeps him in the unfenced yard. Your favorite Pandora station is playing inside with a window open so you can hear it. You look up from the steaks to see an election campaigner in your back yard. He says he knocked on the front door, but nobody answered. He heard some music, smelled the grill, and figured someone was home, so he came around back.

Are you surprised to see a stranger in your backyard? Is it an accepted fact of life that while someone may approach your front door to engage you in a conversation, sale, or delivery, you would not expect that stranger to simply walk into your backyard uninvited? Does the common understanding change if the unauthorized entrant is a police officer, one without a warrant or any probable cause or reasonable suspicion of criminal activity?

The Court of Appeals believes the police, without a warrant, are more than welcome to enter your backyard. In so doing, it has gutted the concept of a "knock and talk" and granted the police carte blanche to encircle every home in Michigan, provided "various observable signs" hint that someone is home. The Court of Appeals ignored United States Supreme Court precedent (and common understanding) of how the public treats visitors to our homes. Put simply, knock on the front door and if unanswered, leave. The Court of Appeals' majority decision jeopardizes the Fourth Amendment's protections and creates an issue of major significance to this State's jurisprudence.

Further, this case presents a question of first impression regarding whether the good faith exception applies to illegal predicate searches.

Statement of Judgment and Order Appealed from and Relief Sought

The judgment from which Defendant Radandt appeals was entered on October 25, 2012.[1] On January 17, 2013, Defendant Radandt timely filed an application for leave with this Court. On March 14, 2013, this Court denied that application. On May 9, 2013, Defendant timely filed an application for leave to appeal to the Supreme Court. On January 29, 2014, the Supreme Court remanded the case to the Court of Appeals on leave granted to address 1) whether the police unlawfully expanded the knock and talk procedure by entering the Defendant's backyard

[1] Exhibit 1, 10/25/12 Transcript.

and onto his wooden deck and 2) whether the good faith exception applies. On December 4, 2014, a majority of the Court of Appeals panel affirmed the trial court's decision to deny Defendant's motion to suppress based on a violation of the Fourth Amendment.[2] On January 26, 2015, Defendant timely filed this application for leave on.

Statement of Facts

The Defendant's home fronted 6th Avenue. 8/13/12 Transcript at 20. During the evidentiary hearing, the front the home was referred to as the west side of the home, with the east side being the rear of the home. *Id*. at 20-21, 57. A driveway lied to the north of the home. *Id*. at 20. A barn existed at the end of the driveway. *Id*. The front, or west side of the home, had a porch with a door. *Id*. For purposes of this Brief, this will be referred to as the "front door." Another door existed on the north side of the home, abutting the driveway. *Id*. For purposes of this Brief, this will be referred to as the "middle door." Approximately 20 feet from the middle door, was the corner of the home leading to the backyard. *Id*. On this east side of the home, a slider door was present. *Id*. A wooden deck or steps was attached to the slider door. *Id*. at 20-21.

An evidentiary hearing was held on August 13, 2012. The Officers testified that in the summer of 2011 ("summer entry"), they received an anonymous tip that the subject property had lights on at night, heavy traffic, and that marijuana was being grown. *Id*. at 8-9, 12. During the summer entry, the Officers entered the property to investigate the tip but found what appeared to be a "vacant" home. *Id*. at 9, 34, 52, 94. Nonetheless, the officers traversed the entire property, circled the home, looked into windows, and knocked on doors on all sides of the home. *Id*. at 34, 53-54, 117. The officers found holes in the ground, which they believed were reminiscent of holes left by marihuana plants and black window coverings. *Id*. at 35-36. The Officers concluded

[2] Exhibit 2, 12/4/14 Court of Appeals Opinions.

these findings did not constitute probable cause and did not seek a warrant. *Id*. at 36. However, this investigation stuck with the Officers and played a role in their later decisions. *Id*. at 113.

These were not the only investigatory measures used. The Officers, during this summer entry, also obtained permission to walk trails from neighboring property owners. *Id*. at 15, 70. The Officers walked the trails behind the subject property, and even went on the back portion of the subject property, but found no evidence of criminal activity. *Id*. at 15, 36.

Months later, in December 2011 ("winter entry"), Officers received another anonymous tip complaining of lights on upstairs and traffic at the subject property. *Id*. at 95. The Officers entered the property and noted vehicles in the driveway, a light on in the barn, and an open barn door. *Id*. at 23. Officer McCoy bypassed the front door and knocked on the middle door on the north side of the home. *Id*. at 19-20, 23, 79. McCoy received no answer. *Id*. at 23. Officer Abnet also bypassed the front door and knocked on the middle door. *Id*. at 100, 107-108. Both Officers, without any reasonable suspicion of criminal activity or any probable cause to believe that criminal activity was present in the backyard, rounded the corner to knock on the rear sliding door. *Id*. at 23, 113-14. The Officers claim traffic patterns led them around the corner, but admitted they also walked around the house without traffic patterns guiding them. *Id*. at 54. For the **first time**, McCoy could hear voices and music from the second story within the home. *Id*.

From this position, at the very rear of the home, McCoy observed a vent from a second story window and smelled marijuana. *Id*. at 24-25, 41, 56-57, 80. This was the first vantage point from which McCoy could see the vent and smell marijuana. *Id*. at 45. McCoy also noted the windows were "blacked out – the same way they were before…." (referring to the summer entry) *Id.* at 25. This power vent was not able to been seen from the driveway. *Id*. at 44, 45.

The Officers came to the subject property on two dates, saw the property in two very different contexts, and acted in the exact same manner. *Id*. at 55. The Officers did not perform an independent investigation into the anonymous tips, other than the warrantless entries described above. *Id*. at 65. Specifically, they did not visit the property at night or confirm any drug trafficking. *Id*. 65-66, 81, 104.

The Officers used this information to obtain a search warrant for the subject property. The affidavit submitted by Det. McCoy contains the following facts: officers received an anonymous tip in the summer of 2011 that individuals at the subject property were manufacturing large amounts of marijuana; that officers visited the property and found holes in the ground reminiscent of those left my marijuana plants; that the second story's window were covered with black plastic; that officers received tips in the winter of 2011 regarding traffic at the property at all hours; that officers visited the property in the winter of 2011 and observed the black window coverings, a power vent in the window, and smelled an order of marijuana thought to be in the growing process. The affidavit failed to include specifics as to the layout of the property, the doors bypassed, or the distance between doors. Further, the affidavit did not provide a clear chain of events as to when the Officers heard the voices from upstairs. 8/13/12 Transcript at 39-44.

As a result of the executed search, Defendant Radandt was charged with the manufacture of marijuana in violation of MCL 333.7401(2)(d)(ii), felony firearms in violation of MCL 750.227b, and maintaining a drug house in violation of MCL 333.7405(1)(d). The trial court denied Defendant's motion to suppress/dismiss finding the Officers merely followed a path to the rear of the home and were "not looking for any contraband in the back yard, as in Galloway." Exhibit 1 at 49-51. Specifically, the Court stated, "I find that there was no reason for them not to go into the backyard when they believed it was a path to another door the people used to enter

the building to try and gain access to talk to somebody. So that's my ruling." Exhibit 1 at 51. The Court did not make express rulings on the issues of curtilage or whether the good faith exception applied. *Id*. at 47-51. Mr. Radandt entered a conditional plea allowing him to pursue this appeal while his sentence is stayed.

Standard of Review

The standard of review as to questions of law is de novo. *People v Sierb*, 456 Mich 519, 522; 582 NW 2d 219 (1998). A trial court's factual findings are reviewed for clear error. *People v Miller*, 482, Mich 540, 544; 759 NW2d 850 (2008). Clear error exists if the reviewing court is left with a definite and firm conviction the trial court made a mistake. *Id*.

Argument and Authorities

I. THE OFFICERS' WARRANTLESS ENTRY INTO THE DEFENDANT'S BACKYARD CONSTITUTED A SEARCH.

Both the United States and Michigan Constitutions guarantee the right of the people to be free from unreasonable searches and seizures. US Const, amend IV; US Const, amend XIV; Const 1963, art 1, §11. A search and seizure conducted without a warrant is per se unreasonable unless the search and seizure fall into a specific exception with well-defined parameters. *People v Wilson*, 257 Mich App 337, 351; 668 NW2d 371 (2003), vacated in part on other grounds 469 Mich 1018; 677 NW2d 29 (2004). To implicate these provisions, the government must first conduct a search, which is defined as an intrusion on a person's reasonable or justified expectation of privacy. *People v Taylor*, 253 Mich App 399, 404; 655 NW2d 291 (2002). While a technical trespass does not per se create an unreasonable search, this Court must evaluate the totality of the circumstances to determine if a constitutional violation has occurred. *People v Houze*, 425 Mich 82, 93; 387 NW2d 807 (1986); *Taylor*, 253 Mich App at 404.

The touchstone of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy." *Katz v United States*, 389 US 347, 361 (1967) (Harlan, J., concurring). *Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? *Katz* at 361 (Harlan, J., concurring).

At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. *Kyllo v United States*, 533 US 27, 31 (2001). The curtilage of a home is considered part of the home itself for Fourth Amendment purposes. Const 1963, art 1, §11; *Feller v Township of West Bloomfield*, 767 F Supp 2d 769, 772-73 (ED Mich 2011). "[E]very curtilage determination is distinctive and stands or falls on its own unique set of facts." *Daughenbaugh v City of Tiffin,* 150 F.3d 594, 598 (6th Cir.1998). When determining what is included in the curtilage of a specific home, there are four factors to consider. These factors are "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *United States v Dunn*, 480 US 294, 301 (1987). These factors do not yield a definite answer; rather, they guide [us] in determining whether the area is "so intimately connected to the home that it should fall under the umbrella of Fourth Amendment protections." *United States v Johnson*, 256 F.3d 895, 911 (9th Cir. 2001) (en banc).

A backyard accessible only by walking around the side of a home is a place generally recognized as "an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *Florida v Riley,* 488 US 445, 452 (1989) (O'Connor, J., concurring) (quoting *California v Ciraolo,* 476 US 207, 213 (1986)); *Daughenbaugh at* 601–

02 (concluding that an entire backyard was within the curtilage of the home). Further, the presences of space for gardening and hanging our laundry to dry has also been found to constitute curtilage. *United States v Jenkins,* 124 F.3d 768, 772–73 (6th Cir. 1997).

Here, during the summer entry, the Officers entered the Defendant's property, bypassed the front door, and knocked on the side door. Receiving no answer and noticing the home appeared "vacant," the Officers circled the home and peered inside the windows. The Officers were able to obtain a view of the first level of the inside of the home by circling the home and looking into windows. Governmental action to enter someone's property, ignore the obvious signs no one is home to answer, then circle the home while peering inside windows, is not an attempt at ordinary citizen contact and violates a reasonable expectation of privacy.

During the winter visit, the Officers found a home in a different state, but took the same actions. While this visit showed some signs of life, the Officers' actions were identical to the summer visit. They entered the property, ignored the front door, knocked on the middle door, received no answer, and moved around to the back of the home to wooden deck affixed to the home and rear sliding door. Only at this point did one of the officers smell marijuana.

The sliding door at the rear of the home and the wooden deck affixed to the home more than satisfies the *Dunn* proximity factor. This sliding door directly opens *into* the home. While the rear of the home is not "enclosed," the home is located in a rural area in which unannounced visitors would not come upon the rear of the home. As proof, the Officers needed to obtain consent to enter the neighbor's property to view the back of Defendant's home. 8/13/12 Transcript at 72. As a result, Defendant's backyard, and specifically the east side sliding door area, satisfies the *Dunn* enclosure factor. The area behind the home was used as *an* entrance to the home, but in order to reach that area, visitors to the home would have to bypass two other

doors. As a result, the layout of the home indicates an unannounced visitor would not simply walk into the backyard such that *Dunn's* nature of use factor is satisfied. *Jenkins* at 773 (observing the placement of the back yard behind the house naturally protected it from the view of passers by on the only public road adjoining the property); *Daughenbaugh* at 600-01 (holding a home's backyard was curtilage in spite of evidence that neighbors could see at least a portion of the yard). Finally, similar to the lack of an enclosure, the protections needed to keep this area of the home private were minimal given its rural setting. Given the immediate proximity to the home and the nature of the use of the door, as a point of entry to the home, the *Dunn* factors heavily weigh in favor of a finding the officers were within the curtilage of the home during both the summer and winter entries such that constitutional implications are squarely at issue.

II. THE OFFICERS UNLAWFULLY EXPANDED THE KNOCK AND TALK PROCEDURES.

A. The Public Recognizes a Limited License to Approach the Front Door and Nothing More.

The United States Supreme Court, in *People v Jardines*, __ US __; 133 S Ct 1409, 1414; 185 L Ed 2d 495 (2013), held that the police use of a trained detection dog on the front porch of a private home constitutes a search within the meaning of the Fourth Amendment. Both the majority and the dissent framed the analysis by finding the front door was a public entrance for use by strangers. Chief Justice Roberts, writing for the majority, stated:

> We have accordingly recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." **This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave**. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant

> may approach a home and knock, precisely because that is "no more than any private citizen might do." (emphasis added) (citations omitted).

Id. at 1415-1416. Further, the *Jardines* dissent stated "the law of trespass generally gives members of the public a license to use a walkway to approach the front door of a house and to remain there for a brief time. *Id*. at 1420 (Altio, J., dissenting).

The Court of Appeals ignored this precedent and this common understanding of how strangers approach our private homes. The officers at issue knocked and received no answer. At that point they should have left. Instead, they entered the back yard.

B. History Of The Knock And Talk Procedure Under 4th Amendment Principles.

The constitutionality of knock and talk procedures was addressed in *People v Frohriep* 247 Mich App 692; 637 NW2d 562 (2001). Here, the Court defined a knock and talk as:

> a law enforcement tactic in which the police, who possess some information that they believe warrants further investigation, but that is insufficient to constitute probable cause for a search warrant, approach the person suspected of engaging in illegal activity at the person's residence (even knock on the front door), identify themselves as police officers, and request consent to search for the suspected illegality or illicit items.

Id. at 697. The Court determined the knock and talk procedure was constitutional largely because it is nothing more than ordinary citizen contact. In other words, constitutional considerations do not come into play just because a police officer, rather than a friend or neighbor, is coming to an individual's front door. When a police officer uses this measure as a springboard to obtain consent to search, no constitutional violation occurs. *Id*. at 697-99.

At the same time, the Court of Appeals recognized that the constitutionality of the knock and talk procedure must be weighed on a case-by-case basis. *Id*. at 698-99. As to the facts of *Frohriep,*

this Court found no constitutional issues were implicated because the contact between the officers and the defendant was nothing more than "ordinary citizen contact," not a seizure of the defendant:

> The police action, i.e., approaching defendant as he was standing in his yard, did not amount to a seizure of defendant. The police simply identified themselves, told defendant they had been informed that he had controlled substances on his property, and asked defendant's permission to 'look around.' There is no indication that defendant was not free to end the encounter…Thus, the initial contact with defendant did not have any constitutional implication on the basis of a seizure because there is no indication that any seizure of defendant occurred.

Two years later, the Court of Appeals was presented with another knock and talk case: *People v Galloway*, 259 Mich App 634; 675 NW2d 883 (2003). Here, police conducted a helicopter flyover after receiving an anonymous tip about the cultivation of marijuana. *Id*. at 636. The Court found these facts did not fit within *Frohriep's* rationale for the knock and talk procedure because the police conduct substantially strayed from *Frohriep's* "ordinary citizen contact" underpinnings:

> This case does not fit within the knock and talk framework. Helicopter surveillance and movement by law enforcement officers on the ground directly into the backyard of a private home do not constitute ordinary citizen contact. The knock and talk in this case is more aptly described as an investigatory entry of the back area of defendant's home. Such investigatory entry by law enforcement fails Fourth Amendment safeguards.

Id. at 640. Further, the Court found it significant that the alleged knock and talk procedure was not used as a springboard to obtain consent, but instead, was used "as a springboard to a plain view exception to the warrant requirement." *Id*. Because the officers were not lawfully present in the location in which they viewed the marijuana, the plain view exception was unavailable and the evidence was suppressed. *Id*. at 640-41.

Recent federal court precedent helps clarify the purpose and limitations of a knock and talk procedure, which is by definition, a warrantless entry into an individual's curtilage. In *United States v Perea-Rey*, 680 F.3d 1179 (2012), the Ninth Circuit addressed a knock and talk procedure allegedly used in connection with the housing of illegal immigrants. Here, the border patrol agent witnessed an individual climb over the United States/Mexico border, get in a taxi, and arrive at a location about a mile from the border. *Id.* at 1183. The border patrol agent witnessed the individual knock on the front door of a home, the door answered by someone within the home, and the home occupant's gesturing of the suspected illegal alien toward the carport on the east side of the home. *Id*. The border patrol agent followed the suspected illegal alien into the carport and immediately required all individuals present to stay still while backup arrived. *Id.* After backup arrived, the border agent knocked on the door and ordered everyone to exit. *Id.* After being charged, the defendant moved to dismiss arguing the border patrol agent's actions were unconstitutional. *Id.*

The Ninth Circuit held the warrantless entry into the carport was not excused by the claimed knock and talk exception and found a constitutional violation. In reaching this conclusion, the Court cited recent United State Supreme Court precedent regarding subjective intent of the officers. *Perea-Rey* at 1187 ("Although it has not addressed the knock and talk expansion, the Supreme Court has unequivocally disallowed reliance on the good faith or subjective beliefs of officers as part of the analysis of whether they violated the Fourth Amendment." citing *Kentucky v King*, 131 S Ct 1849, 1859 (2012); see also *Bond v United States*, 529 US 334, 339; 120 S Ct 1462; 146 L Ed 365 (2000) (The subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment."). Without the subjective intent of the officers at issue, the Court determined the "constitutionality of such entries into the curtilage hinges

on whether the officer's actions are consistent with an attempt to initiates consensual contact with the occupants of the home." *Id*. at 1187-88.

The Ninth Circuit stated that while knocking on the front door, as opposed to a different door, is not required, "once an attempt to initiate a consensual encounter with the occupants of a home fails, 'the officers should end the knock and talk and change their strategy by retreating cautiously, seeking, a search warrant, or conducting further surveillance.'" *Id*. at 1187-88 citing *United States v Troop*, 514 F3d 405, 410 (5th Cir. 2008) (holding that border patrol agents violated the Fourth Amendment when they conducted a warrantless search of the curtilage after there was no response to a knock and talk attempt).

The Court concluded it was not reasonable for the border patrol agent to bypass the front door after seeing it answered, the border patrol's actions to seize individuals undermined the argument that he was there to initiate conversation, and rejected the idea that a knock and talk permits warrantless searches (*Perea-Rey* at 1189):

> At most, the knock and talk exception authorizes officers to enter the curtilage initiate a consensual conversation with the residents of the home. If we were to construe the knock and talk exception to allow officers to meander around the curtilage and engage in warrantless detentions and seizures of residents, the exception would swallow the rule that curtilage is the home for Fourth Amendment purposes.

In summary, *Frohriep* set the standard for Michigan knock and talk cases to be judged against. *Galloway* is an example where *Frohriep's* standard was violated because the officers did not engage in "ordinary citizen conduct" to gain permission to search, but rather, used the procedure to conduct an investigatory entry. *Perea-Rey* is instructive in the weight afforded to the subjective intentions of the officers, the need to retreat after a failed attempt at contact, and the concept of the knock and talk against traditional Fourth Amendment principles.

C. The Officers' Summer Entry to Defendant's Property Was an Unlawful Expansion of a Knock and Talk

In the summer of 2011, the officers found a "vacant" home, bypassed the front door, knocked on a side door, received no answer, entered the property (including backyard), looked in all the windows, walked throughout the yard, and obtained consent from neighbors to walk the rear of the property. These actions are not consistent with *Frohriep's* ordinary citizen contact standard. In contrast, they are more similar to the *Galloway* officer's investigatory measures.[3] The Officers used investigatory measures by obtaining permission from neighbors to walk trails behind the property (similar to *Galloway's* helicopter flyover), failed to knock on the subject property's front door (same as *Galloway)*, descended upon the yard in an effort to search the area, including peering into the windows on the first floor. Similar to *Galloway*, the officers were using the purported knock and talk not as a springboard to obtain consent, but rather, as a sham to perform an investigatory search. If the officer's intent was truly to make contact, they should have left after not receiving an answer when knocking. *Perea-Rey* at 1187-88. The Officers' actions during the summer entry were simply not "consistent with an attempt to initiates consensual contact with the occupants of the home" and violated Defendant's Fourth Amendment rights. *Id*.

D. The Officers' Winter Entry into Defendant's Property Was an Unlawful Expansion of a Knock and Talk

The instant trial court distinguished *Galloway* finding the Officers' winter entry into the backyard was an effort to make contact with the suspects because the Officers did not have any reason to believe evidence of criminal conduct would be found in the backyard. 10/15/12 Transcript at 49-51. The trial court determined the officers were not "looking for contraband in the backyard." *Id*. The trial court erred by weighing the subjective intent of the officers. *Bond* at

[3] In fact, the Prosecution concedes the summer visit should be stricken from the search warrant affidavit. 10/25/12 Transcript at 33.

339 ("The subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment.").

Further, the trial court erred by failing to hold the Officers to *Frohriep's* ordinary citizen contact standard. An ordinary citizen would **not** knock on the door to a residence, fail to receive an answer, and without hearing any voices,[4] simply walk into the backyard. *Perea-Rey* at 1887-89 ("once an attempt to initiate a consensual encounter with the occupants of a home fails, 'the officers should end the knock and talk and change their strategy by retreating cautiously, seeking, a search warrant, or conducting further surveillance.'"). This was not ordinary citizen conduct; rather, this was a *Galloway* like investigation. Instead of retreating after their attempts to knock were unsuccessful, the Officers walked into the Defendant's backyard. From this vantage point, Officer McCoy heard voices and smelled marijuana for the first time. The Officers were using the knock and talk in the same manner as the summer entry, as a springboard to perform a search. Because the Officers were not lawfully present in the location in which they smelled the marijuana, the evidence must be suppressed. *Galloway* at 640-41.

Finally, even if this Court finds the winter entry to be reasonable, this Court cannot ignore, as the trial court did, the impact of the *summer* entry on the *winter* entry. Even the Prosecution concedes this was an illegal entry and search. The Officers were met with an unsuccessful knock and talk during the summer entry. Yet, they did not retreat. Instead, they entered the property and found holes in the ground and black window coverings, which were significant enough findings to be included in the sparse search warrant affidavit. In other words, the officers illegally obtained knowledge regarding the home and used that knowledge as a reason to enter the backyard during the winter entry:

[4] 8/13/12 Transcript at 54.

> Q: And at the time you went to the back of the house, you didn't have any reasonable suspicion of any criminal activity afoot on the premises or any probable cause to believe that criminal activity was present, isn't that right?
>
> **A: No, other than what we saw in August.** 8/13/11 Transcript at 113.

The Officers' entry into the Defendant's backyard during the winter entry was "the product" of the illegal summer entry. See *People v Bolduc*, 263 Mich App 430, 444; 688 NW2d 316 (2004) (suppression was proper because evidence was the "product of the seizure of his person that resulted from the failure of the police to depart the residence.") The winter entry was tainted by the illegal summer entry such that the fruits of the search must be suppressed.

III. THE GOOD FAITH EXCEPTION DOES NOT APPLY BECAUSE THE SEARCH WARRANT AFFIDAVIT WAS SOLELY BASED ON PROBABLE CAUSE OBTAINED FROM ILLEGAL PREDICATE SEARCHES.

A. History Of The Good Faith Exception To The Exclusionary Rule.

Evidence that is seized as the result of an unconstitutional search and seizure is prohibited from being admitted in court, and this exclusion extends to the introduction of materials and testimony that are the direct or indirect result of an illegal search. *People v Stevens*, 460 Mich 626, 634; 597 NW2d 53 (1999). The United States Supreme Court referred to this evidence as "fruit of the poisonous tree." *Wong Sun v United States*, 371 US 471, 487–488 (1963). The exclusionary rule known as the "fruit of the poisonous tree" doctrine is designed to safeguard against future violations of the Fourth Amendment through the rule's deterrent effect of excluding evidence found or elicited as a result of unconstitutional activity. *People v Reese*, 281 Mich App 290, 295; 761 NW2d 405 (2008).

The United States Supreme Court adopted the "good faith" exception to the exclusionary rule in *United States v Leon*, 468 US 897 (1984). Here, the Court held that the exclusionary rule does not bar the admission of evidence seized in "reasonable reliance on a search warrant issued

by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." *Id*. at 900. Michigan adopted this ruling in *People v Goldston*, 470 Mich 523; 682 NW2d 479 (2004). The United State Supreme Court based this exception to the warrant requirement on a balancing test between the benefits of deterrence against the costs of exclusion. *Leon* at 906-07. And as the this Court has stated, the purpose of the rule is to "deter police misconduct." *Goldston* at 480, 483. On the other hand, the costs include preventing the use in the prosecutor's case in chief of trustworthy evidence obtained in reliance on a search warrant subsequently found to be defective. *Id*. at 482.

B. Split Of Authority Regarding *Leon's* Good Faith Exception To Predicate Illegal Searches.

Leon only addressed search warrants that were technically deficient or based on affidavits that failed to establish probable cause. It did not, however, address the interplay between the good faith exception and the "fruit of the poisonous tree" doctrine established by *Wong Sun*. *United States v Meixner*, 128 F Supp 2d 1070, 1076 (ED MI 2001). In other words, the issue left unanswered and now before this Court is whether *Leon's* good faith exception applies when officers act pursuant to search warrant that is based on an illegal predicate search. This question has created inconsistent opinions within the Sixth Circuit and a circuit split in the federal courts.

In 2012, the Sixth Circuit stated the "answer to this question is far from clear, and we have issued inconsistent opinions on the issue. *United States v Fugate*, Docket No. 11-3694 (filed September 7, 2012), attached in Appendix citing *United States v McClain*, 444 F3d 556, 559 (6 Cir 2006) and *United States v Davis*, 430 F3d 345, 385 n.4 (6 Cir 2005).

In *McClain*, an officer responded to a dispatch call regarding "suspicious activity" at a home believed to be vacant. *McClain* at 559-60. The officer circled the home and found nothing out of the ordinary until he reached the front door, which was slightly ajar. *Id*. He entered the home suspecting

a burglary was in process. *Id*. While in the basement, he found evidence that a marijuana grow operation was being planned, although he did not find any marijuana. *Id*. The officer left the home. *Id*. A supervisory officer began investigating the home and over several weeks of investigation, determined the occupants were setting up a marijuana grow operation at this residence and others. *McClain* at 559-60. The supervisory officer obtained search warrants for the house and five other locations he linked through his investigation. *Id*. The affidavit relied, in part, on the evidence obtained during the warrantless entry into the home and explicitly described the circumstances of that search. *Id*. Execution of the search warrants revealed a large number of marijuana plants. *Id*. McClain moved to suppress and the lower court found the warrantless entry and search required the suppression of the evidence and that the good faith exception did not apply. *Id*. at 561.

On appeal, the Sixth Circuit found the entry warrantless of the home was not supported by probable cause, but reversed based on the good faith exception. *Id*. at 564-66. The Court wrestled with the conflicting opinions from other circuits, but determined "this was one of those unique cases in which the *Leon* good faith exception should apply despite an earlier Fourth Amendment violation." *Id*. at 565-66. In coming to this decision, the Court largely relied on two points: 1) an Eighth Circuit opinion that based its determination on whether the exclusionary rule should apply on the how close the infringing officer's conduct was "to the line of validity" (*United States v White*, 890 F2d 1413, 1419 (8th Cir 1989)) and 2) and, in the words of the Sixth Circuit, more important than the Eight Circuit's opinion, the officers who sought and executed the search warrants were *not* the same officers who performed the initial warrantless search and the affidavit, prepared by the officer that did not make the illegal entry, fully disclosed to a neutral magistrate the circumstances surrounding the initial search. *Id*. at 566.

On the other hand, the Sixth Circuit reached an opposite conclusion in *Davis*. Here, officers performed a traffic stop on an individual thought be trafficking narcotics. *Davis* at 349. Roughly thirty minutes later, a drug-sniffing dog was brought to the stop, but failed to alert for drugs. *Id*. at 350. Subsequently, a DEA agent arrived and ordered another drug dog to the scene. *Id*. Roughly an hour later, the second dog returned a positive alert, which then led to a search warrant and the recover of a large amount of cash. *Id*. Davis moved to suppress the search, but the lower court denied the motion finding reasonable suspicion to justify the continued detention of Davis. *Id*.

On appeal, the Court reversed finding that once the drug-sniffing dog failed to alert positively to the presence of drugs, the officer's suspicions that Davis was in possession of narcotics was dispelled. *Id*. at 356. As a result, the officers had no reason to continue to detain Davis to permit a second examination. *Id*. The next question for the court was whether the warrant cured the constitutional defect. The Court found it did not, mainly because the warrant, after the information obtained in violation of the Fourth Amended was removed, failed to provide probable cause to support its execution. *Id*. at 358. While the prosecution did not rely on the good faith exception, the Sixth Circuit announced its decision on whether *Leon* would apply:

> Moreover, we agree with the numerous other circuits that have held that the Leon good faith exception is inapplicable where a warrant was secured in part on the basis of an illegal search or seizure. See *United States v Reilly*, 76 F3d 1271, 1281 (2nd Cir 1996) (collecting cases); *United States v Bishop*, 264 F3d 919, 924 n.2 (9th Cir. 2001).

C. This Court Should Follow the Circuit Precedent Holding the *Leon* Good Faith Exception Does Not Cure the Constitutional Violation At Issue

In this issue of first impression, Defendant requests this Court adopt the standard referred to in *Davis* and as accepted by the Second Circuit,[5] Ninth Circuit,[6] Tenth Circuit,[7] District Court

[5] *United States v Reilly*, 76 F3d 1271, 1281 (2nd Cir 1996).

of New Jersey,[8] and four state Supreme Courts[9]: **that the *Leon* good faith exception is inapplicable where a warrant was secured in part on the basis of an illegal search or seizure.**

Put simply, when the officers' own wrongful conduct produces the probable cause to support a warrant, the *Leon* exception is not applicable because it does not fit within the *Leon's* rationale. Here, it is the officer, not the magistrate, making the constitutional error. There is no reason, under *Leon*, to excuse that error. *People v Machupa*, 872 P2d 114, 122 (Cal 1994) ("Because the exclusionary rule will not deter the 'objectively reasonable' conduct of a police search made in reliance on a warrant previously issued by neutral and detached magistrate, it should not be applied in such cases. That rationale, however, is absent where the initial Fourth Amendment violation is the product of police rather than magisterial conduct.").

CONCLUSION

WHEREFORE, Defendant-Appellant Radandt respectfully requests this Court grant his application for leave to appeal or any other relief this Court deems appropriate.

Respectfully submitted,

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[6] *United States v Bishop*, 264 F3d 919, 924 n.2 (9th Cir. 2001).
[7] *United States v Scales*, 903 F2d 765, 768 (10th Cir 1990).
[8] *United States v Villard*, 678 F Supp 483, 490-93 (D NJ 1988).
[9] *State v DeWitt*, 901 P2d 9, 15 (Ariz 1996); *State v Reno*, 918 P2d 1235, 1243 (Kan 1996); *People v Machupa*, 872 P2d 114, 124 (Cal 1994); *State v Carter*, 630 NE2d 355, 364 (Ohio 1994).